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SUPREME COURT, STATE OF COLORADO **2 East 14th Avenue, Denver, CO 80203** **Court of Appeals Case Number: 06CA733** **District Court, City and County of Denver, CO** **Trial Court Judge: Hon. Michael A. Martinez** **Trial Court Case Number: 05 CV 4794**	
APPELLANTS: Anthony Lobato, as an individual and as parent and natural guardian of **Taylor Lobato** and **Alexa Lobato**; *et al.*, **APPELLEES: The State of Colorado;** *et al.*	▯ COURT USE ONLY ▯
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the court of appeals erred in holding that claims regarding educational quality and adequacy of school funding brought pursuant to article IX, section 2 of the Colorado Constitution (the Education Clause) present nonjusticiable political questions.

B. Whether the court of appeals erred in holding that the school districts do not have standing to bring suit under article IX, section 15, of the Colorado Constitution (the Local Control Clause) challenging the constitutionality of the Colorado system of public school finance.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action for declaratory and injunctive relief brought pursuant to C.R.C.P. 57 and 65 and the Uniform Declaratory Judgments Law, C.R.S. §§13-51-101, *et seq.*

The Appellants (hereinafter, Plaintiffs) include individual parents and school children (the Individual Plaintiffs) from eight (8) school districts across the state and fourteen (14) Colorado school districts (the School District Plaintiffs).

The Appellees (the "State" or the "Defendants") are the State of Colorado, the Colorado State Board of Education, the Commissioner of Education, and the Governor.

Plaintiffs claim that as a result of under-funding and irrational and unequal funding of public education, the State is failing to provide a constitutionally adequate, quality public education and that the public school finance system fails to provide the financial resources necessary for school districts to exercise control of instruction in their schools. Plaintiffs claim that Colorado's public school finance system violates their rights guaranteed by article IX, sections 2 and 15 of the Colorado constitution.

B. The Course of the Proceedings, and Disposition in the Court Below

This action was filed on June 24, 2005, in the district court, City and County of Denver, Colorado. By Order dated March 2, 2006, the district court granted the State's Motion to Dismiss all claims pursuant to C.R.C.P. 12(b)(5). On appeal, the Court of Appeals affirmed the decision of the district court, finding that the Plaintiff School Districts did not have standing and that the claims under the Education Clause were nonjusticiable under the political question doctrine. *Lobato v. State*, 2008 WL 194019 (Colo. App.) (Jan. 24, 2008) (*Lobato*).

STATEMENT OF THE FACTS

The district court granted the State's C.R.C.P. 12(b)(5) motion to dismiss, and the Court of Appeals upheld that decision. Review in this Court is *de novo*; and the Court accepts all allegations of material fact in the complaint as true and views them in the light most favorable to the Plaintiffs. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004).

The Individual Plaintiffs include representatives of children in nearly every socio-economic class. They are also representative of children who participate in the general education programs, special needs children, and talented and gifted children. The Individual Plaintiffs include children from a diverse range of school districts, including those with small to large populations; rural, suburban, and urban communities: and lower and higher taxable wealth districts. The common thread for all these children is that because of the deficiencies of the present school finance system, they and the hundreds of thousands of similarly situation children in Colorado are not receiving the educational opportunities to which their Constitution entitles them.

The School District Plaintiffs are all of the school districts in the San Luis Valley area of south-central Colorado. These School Districts serve student and taxpayer communities with some of the lowest average levels of personal income,

highest percentages of poverty, and highest percentages of Hispanic, non-English speaking, and migrant students in the state. The School District Appellants are among the school districts in the State that are the most adversely affected by the constitutional deficiencies of the system of public school finance, and they serve student and taxpayer communities who are among the most severely impacted by those constitutional deficiencies.

The following summary of the facts is drawn from paragraphs 3 through 26 of the Complaint. Record, 004-009.[1]

Adopted in 1876, article IX, section 2 of the Colorado Constitution (the Education Clause) mandates that the "general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." R. at 004, ¶ 3.

Article IX, section 15 of the Colorado Constitution (the Local Control Clause) directs the general assembly to "provide for the organization of school districts of convenient size," governed by locally elected boards of education and empowers the directors of the local boards of education with the "control of instruction in the public schools of their respective districts." Control of

[1] References to the Record will be stated as "R. at [page number(s), ¶ number(s)].

instruction by locally elected school boards is an integral component of a thorough and uniform system of public education. R. at 005, ¶ 7.

The general assembly has consistently and repeatedly acknowledged its obligations under the Education Clause and affirmed the fundamental right to an equal opportunity to obtain a quality education. The general assembly has declared that:

> [S]ection 2 of article IX of the state constitution requires the general assembly to provide for the establishment and maintenance of a thorough and uniform system of free public schools. The state therefore has an obligation to ensure that every student has a chance to attend a school that will provide an opportunity for a quality education.[2]

R. at 005, ¶ 8.

The general assembly has acknowledged that compliance with the Education Clause imposes a financial responsibility upon the state. Thus, the Public School Finance Act of 1994 (the Public School Finance Act or PSFA)[3] "is enacted in furtherance of the general assembly's duty under section 2 of article IX of the state constitution to provide for a thorough and uniform system of public schools throughout the state . . . ."[4] R. at 005, ¶ 9.

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[2] C.R.S. §22-30.5-301(1). Cites in the Complaint were made to Colorado Revised Statutes (2004).
[3] §§22-54-101, *et seq.*, adopted in 1994.
[4] §22-54-102(1).

The general assembly has acknowledged the constitutional role of local school districts in the system of public education and has provided for the establishment of school districts by legislation, including, most recently, the School District Organization Act of 1992, as amended.[5] The stated purposes of the School District Organization Act include the general improvement of the public schools, maintaining a thorough and uniform system of free public schools throughout the state, equalization of the benefits of education throughout the state, and more responsible expenditure of public funds for the support of the public school system of the state. R. at 005, ¶ 10.

Beginning in the 1990s, in the name of education reform, the State of Colorado has undertaken a legislative transformation of the public education system.[6] This "education reform legislation" includes, without limitation, the Educational Accountability Act of 1971 (the Educational Accountability Act);[7] the Colorado Basic Literacy Act;[8] the Educational Accreditation Act of 1998, (the Educational Accreditation Act);[9] the Safe Schools Act;[10] the Alternative Education

[5] §§22-30-101, *et seq.*, C.R.S. (2004).
[6] For a more extensive description of education reform legislation, *see* R. at 0016-21.
[7] §§22-7-101, *et seq.*, amended in its entirety in 1997.
[8] §§22-7-501, *et seq.*, amended in its entirety in 1997.
[9] §§22-11-101, *et seq*.
[10] §22-32-109.1, adopted in 2000.

Act;[11] the English Language Proficiency Act (ELPA);[12] and Colorado Commission on Higher Education admissions standards.[13] R. at 005-006, ¶ 11.[14]

Key elements of the education reform legislation include the implementation of a state-wide standards-based education system incorporating mandatory minimum public school content standards and associated student performance objectives; universal assessment of public school student proficiency with respect to these content standards by standardized testing; comparative rating of the performance of students, schools, and school districts measured by the results of these assessments; and school and school district accountability for student assessment results and progress, including a mandatory improvement process for schools deemed "unsatisfactory" leading to a comprehensive restructuring of the school.[15] R. at 006, ¶ 12.

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[11] §22-7-604.5, adopted in 2002.
[12] §§22-24-101, *et seq.*
[13] §23-1-113(1)(b), adopted in 2000.
[14] Last session, the legislature enacted a second round of "school reform" measures, entitled CAP 4 K. C.R.S. §§22-7-1002, *et seq.* This legislation does not alter any of the fundamentals of the school finance system as described in the Complaint and this Brief.

[15] Statutory provisions that formerly mandated conversion to a charter school were amended by the general assembly to provide for a number of restructuring alternatives by House Bill 05-1216, signed by the Governor on June 9, 2005.

Colorado has elected to conform to the requirements of the federal No Child Left Behind Act of 2001[16] (NCLB), and, in furtherance thereof, the State Board adopted the Colorado Consolidated State Plan (the Consolidated State Plan) in 2002.[17] NCLB and the Consolidated State Plan establish a statewide accountability system holding school districts and schools accountable for improving academic achievement of all students, identifying and turning around low-performing schools, providing high-quality alternatives to students in low-performing schools, and improving accountability, teaching, and learning by the use of state assessment systems, all designed to ensure that students meet challenging state academic achievement and content standards and are increasing achievement in compliance with a schedule of annual yearly progress designed to accomplish one hundred percent academic proficiency by the school year 2013-14. R. at 006, ¶ 13.

Education reform legislation and the Consolidated State Plan have established standards, goals, objectives, methods, and information that assist in defining, without limiting, the qualitative mandate of the Education Clause; measuring whether the State has fulfilled its constitutional responsibilities; and determining whether there are sufficient financial resources to establish and

[16] 20 U.S.C. §§6301, *et.seq*.
[17] For a more extensive description of No Child Left Behind and the Consolidated State Plan, *see* R. at 0021-0025.

maintain a thorough and uniform system of free public education in Colorado. R. at 006, ¶ 14.

This legislation substantially expanded the role of the state in areas of instruction, program, and educational policy historically controlled by school districts; significantly increased the testing and administrative tasks of school districts; and has mandated directly and indirectly substantial increases in the costs of providing public education without providing school districts with sufficient funding or the means to obtain sufficient funding to meet those costs. R. at 006-007, ¶ 14.

The Colorado system of public education, and particularly education reform legislation and the Consolidated State Plan, has imposed instructional and other substantive mandates upon school districts without analyzing funding needs or providing the means to fund the accomplishment of those mandates, and prevents school districts from obtaining adequate funding to meet the statutory and constitutional rights of their constituents. R. at 007, ¶ 15.

School districts are controlled and strictly limited by state statutory and constitutional provisions in the revenues they can raise, receive, and expend to provide education programs to the students in their schools. The cost of providing a constitutionally adequate, quality education exceeds the maximum amount of

funding that is available to school districts under the Colorado system of public school finance. R. at 007, ¶ 16.

Governmental funding for Colorado school districts is derived from local taxes, state funds, and, to a significantly lesser degree, federal funds. In school year 2003-04, total public education funding from all sources, excluding bond sale proceeds, was some $6.551 billion, of which school district property tax and other sources contributed $3.257 billion (49.7%), the state contributed $2.838 billion (43.3%), and federal funding provided $456 million (7.0%). R. at 007, ¶ 17.

State and local funding for public education is principally provided through the Public School Finance Act (PFSA).[18] In 2003-04, PSFA funding constituted 89 percent of the state's total contribution to public education funding. The PSFA sets the financial base of support for each school district, referred to as its "total program funding." R. at 007, ¶ 18.

Neither the PSFA funding formula nor the funding levels it establishes and enforces provide school districts with sufficient funds or funding ability to meet the actual and foreseeable costs of educating their students in accordance with the requirements of the Education Clause, education reform legislation, and the Consolidated State Plan. R. at 007, ¶ 19.

[18] For a more extensive discussion of the Public School Finance Act, *see* R. 0026-0030.

The PSFA formula and funding levels are not based upon a valid determination of the actual costs to provide every student with a constitutionally adequate, quality education, or to an education that meets the standards and goals mandated by education reform legislation and NCLB. The PSFA formula and funding levels have never been studied, much less increased, to account for the additional costs to meet the mandates of education reform legislation or the Consolidated State Plan. R. at 007-008, ¶ 20.

The 1994 PSFA base funding amount was based upon historical school funding levels and political compromise and not on the basis of an analytical determination of the actual costs to provide a constitutionally adequate, quality education. From 1994 through 2001, Colorado failed in every subsequent year to provide an increase in the PSFA funding amount that was sufficient to pay for increased school district costs due solely to the percentage change in inflation. The result is a $3.4 billion cumulative shortfall in PSFA funding against inflation alone from 1994-95 to 2004-05. R. at 008, ¶ 21.

A statewide study by the Colorado School Finance Project (CSFP), conducted in accordance with nationally accepted methods of analysis, found that in the 2001-02 school year none of the 178 Colorado school districts were able to raise and expend general operating funds at a level sufficient to provide an

education that could meet the standards and mandates of the education reform legislation, much less the Education Clause. The CSFP study found that in 2001-02 alone Colorado public schools were under-funded by a minimum of $500 million. R. at 008, ¶ 22.

In 2004, Colorado ranked forty-ninth among the fifty states in expenditures per $1,000 of personal income for primary and secondary public education. Although Colorado's average per capita income was seventh highest in the nation and thirteen percent higher than the national average, its rate of state tax collections as a factor of personal income the lowest in the United States and thirty percent below the national average. R. at 008, ¶ 23.

Providing necessary educational services to certain identifiable under-served student populations requires funding above the basic PSFA total program amount. The Colorado public school finance system, through supplements to the PSFA formula and "categorical" program funding, provides limited funds to school districts for low family income ("at-risk") students, preschool and kindergarten education, students whose dominant language is not English, students with disabilities, and gifted and talented students.[19] In 2003-04, categorical funding

[19] For a more extensive discussion of categorical program funding, *see* R. at 0030-0035.

totaled $160 million, or 2.5 percent of the state's financial contribution to public education. R. at 008, ¶ 24.

The public school finance system fails to provide sufficient resources and to allocate resources in a manner rationally determined to meet the actual costs of providing for the educational needs and rights of the under-served student populations. R. at 008, ¶ 25.

Due to under-funding and irrational funding of categorical and other programs intended to provide adequate educational opportunities to these populations, school districts must spend less per pupil than is necessary and/or use additional general operating funds to provide such educational services, further impairing their ability to provide adequate educational opportunities for all students. The Colorado public school finance system particularly fails to meet the constitutional rights of and discriminates against students from lower socio-economic backgrounds, ethnic and racial minorities, non-English speaking families, and students with disabilities across the state. R. at 008-009, ¶ 25.

School district capital outlay expenditures in excess of PSFA capital reserve funding are financed by contracting for bonded indebtedness.[20] School district bonded debt can be paid only by revenues from local mill levies on the taxable

[20] For a more extensive discussion of capital construction funding, *see* R. at 0037-0038.

property within the boundaries of the district, and school districts are limited by statute in the amount of capital funding for which they may contract. R. at 009, ¶ 26.[21]

The system of financing capital outlay expenditures does not provide revenue according to the educational needs of students within each district; does not provide sufficient funding for adequate facilities, technological infrastructure, and equipment; and prevents school districts from adequately addressing capital issues related to growth. R. at 009, ¶ 26.

Due to insufficient financial resources, local school districts, including the School District Plaintiffs, are unable to provide the services, programs, materials, and facilities necessary to meet the educational needs of their students and to comply with the mandates of education reform legislation and the Consolidated State Plan.[22] As a result of under-funding, irrational, and unequal funding of public education, the Plaintiffs and all school children, parents, taxpayers, local boards of education, and school districts in the state have been denied their rights

[21] The "BEST" legislation, §§22-43.7-102 *et seq.*, while an important first step towards recognizing and addressing some of the significant needs, does not alter the fundamental problem of relying exclusively on local property wealth for capital construction and does not resolve the many issues caused by the current structure for funding the building and maintenance of public school buildings.

[22] For a more extensive discussion of the effects of inadequate funding on the ability of school districts to provide services, programs, materials, and facilities, *see* R. at 0044-0046.

and authorities under the Education and Local Control Clauses of the Colorado Constitution. R. at 009, ¶ 28.

SUMMARY OF ARGUMENT

Because it is a "threshold" issue, Plaintiffs have argued the school district standing issue first. The justiciability issue, which involves closer review of the claims on their merits, is argued second.

The School District Plaintiffs Have Standing to Bring this Action. The School District Plaintiffs have standing under the two-prong test adopted in *Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977), and the political subdivision standing rule of *Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1*, 188 Colo. 310, 316, 535 P.2d 200, 204 (1975).

Allegations of infringement upon the School District's constitutional authority under the Local Control Clause are sufficient to satisfy the "injury in fact" requirement. *Colorado General Assembly v. Lamm*, 700 P. 2d 508, 516 (Colo. 1985); *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1376-77 (Colo. 1985). Both the Local Control Clause and the Education Clause create sufficient independent constitutional authority to meet the "legally protected interest" requirement. *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933, 943-44 (Colo. 2004) (*Owens*) (Local Control Clause);

Board of Educ. of Sch. Dist. No. 1 v. Booth, 984 P.2d 639, 645 (Colo. 1999) (Local Control Clause) (*Booth*); *Board of County Comm'rs of Douglas County v. Bainbridge, Inc.*, 929 P.2d 691, 711 (Colo. 1996) (Education Clause).

The Local Control Clause provides an independent legally protected interest within the exception to the general rule that political subdivisions do not have standing to challenge the constitutionality of statutes directing the performance of their duties. *Owens, supra*; *Booth, supra*. The legally protected interest in local control of instruction and exercise of authority in school funding are integrally connected. *Id.*; *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982) (*Lujan*). Local control is a broad concept and is not limited to fiscal control of locally-raised funds. Local control empowers school districts to exercise managerial and administrative control over their local schools without state interference. *Owens*, 92 P.3d at 941; *Lujan*, 649 P.2d at 1022-23.

The Education Clause Claims Are Justiciable. Plaintiffs ask the Court to determine whether the school finance laws comport with the constitutional mandate "to establish and maintain a thorough and uniform system of free public schools." Plaintiffs invoke the core function of the judiciary "to interpret the constitution and say what the law is." *Colorado General Assembly v. Lamm*, 704

P.2d 1371, 1378-79 (Colo. 1985) (*Lamm II*), *quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

Justiciability concerns whether "the duty asserted can be judicially identified and its breach judicially determined, and whether the protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198 (1962) (Baker); *Meyer v. Lamm*, 846 P.2d 862, 871-72 (colo. 1993) (Meyer). The nonjusticiability of a "political question" is rooted in the separation of powers doctrine. *Colorado Common Cause v. Bledsow*, 810 P.2d 201, 205 (Colo. 1991) (Common Cause); *Meyer*, 846 P.2d at 871-72.

Review of the Education Clause claims does not offend the separation of powers doctrine. This Court has consistently held that the Education Clause creates a constitutional right to a public education. *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927), *overruled on other grounds, Conrad v. City and County of Denver*, 656 P.2d 662, 670 fn. 6 (Colo. 1982); *Fangman v. Moyers*, 90 Colo. 308, 8 P.2d 762 (1932); *Lujan*, 649 P.2d at 1025; *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 No. 21 and No. 22 ("English Language Education")*, 44 P.3d 213, 217 (Colo. 2002).

This Court has clearly distinguished between the legislative policy-making function and the judicial function to review the constitutionality of statutes enacted

pursuant to policy-making. In *Lujan*, the Court effectively ruled that school finance claims under the Education Clause do not intrude upon the policy-making powers of the general assembly and are justiciable:

> While it is clearly the province and duty of the judiciary to determine what the law is, the fashioning of a constitutional system for financing elementary and secondary public education in Colorado is not only the proper function of the General Assembly, but this function is expressly mandated by the Colorado Constitution. Colo. Const. Art. IX, Sec. 2. Thus, whether a better financing system could be devised is not material to this decision, as *our sole function is to rule on the constitutionality of our state's system.* This decision should not be read to indicate that we find Colorado's school finance system to be without fault or not requiring further legislative improvements. *Our decision today declares only that it is constitutionally permissible*.

Lujan, 649 P.2d at 1025 (emphasis added).

The political question doctrine is based on separation of powers concerns and addresses those extraordinary situations where the courts must defer from exercising their constitutional role. *Baker*, 369 U.S. at 216. Application of the *Baker* formulations does not compel the conclusion that the Plaintiffs' claims are nonjusticiable.

The mere use of the term "the general assembly shall" in the Education Clause does not establish a textually demonstrable commitment of claims to the legislature alone. The term "general assembly" is a shorthand method of referring to the entire lawmaking procedure, including judicial review for constitutional

compliance. *People ex rel. Salazar v. Davidson,* 79 P.3d 1221, 1236 (Colo. 2003). When read in the context of the entire education article, the Education Clause cannot be construed to commit the field of public education and school finance to the exclusive, unregulated discretion of the legislative branch.

The fundamental components of the qualitative guarantee of the Education Clause are judicially definable and establish minimum standards for the Colorado public education system. The issue is whether there are workable standards to determine whether the Colorado public school finance system provides sufficient funds to establish and maintain a system of public education that meets constitutional and statutory standards.

Public education means education that serves the interests of the state by preparing its children for life within the civic, economic, and cultural world in which they will participate as adults. This Court in *Lujan* incorporated the definition in *Pauley v. Kelly*, 152 W.Va. 672, 255 S.E.2d 859, 877 (1979). This definition has been acknowledged by the general assembly. Most recently, in the 2008 Preschool to Postsecondary Education Alignment Act, the general assembly found that:

> From the inception of the nation, *public education was intended both to prepare students for the workforce and to prepare them to take their place in society as informed, active citizens who are ready to both participate and lead in citizenship.* In recent years, the emphasis in public education has

> been squarely placed on areas of reading, writing, mathematics, and science, but it is important that education reform also emphasize the public education system's historic mission of education for active participation in democracy.

C.R.S. §22-7-1002(1)(c) (2008) (emphasis added).

The general assembly has enacted a pervasive, standards-based system for monitoring student achievement individually, by cohort, by school, and by school district; comparing and ranking the results and progress toward complete proficiency; and applying increasing levels of review and sanction upon schools that fail to meet student achievement markers. Nevertheless, the State has neglected to study, design, enact, implement, or fund a finance system that is intentionally structured to provide the financial resources necessary to attain its stated goals.

This in itself violates the Education Clause: "[A] determination of the reasonable and actual costs of providing a constitutionally adequate education is critical." *Montoy v. State of Kansas,* 279 Kan. 817, 839, 112 P.3d 923, 927 (2005) (Montoy III). The State cannot intentionally fail to direct sufficient funding to the accomplishment of a constitutional mandate:

> [A] funding system that distributed state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives simply would not be a valid exercise of that constitutional authority and could result in a denial of equal protection or due process.

Leandro v. State, 346 N.C. 336, 352-353, 488 S.E. 2d 249, 258 (1997) (Leandro).

The Education Clause and education reform legislation provide workable standards to determine that the public school finance system fails to provide sufficient funds in a rational manner, and that this failure violates the rights of the Plaintiffs.

The declaratory and injunctive relief sought by the Plaintiffs will not usurp the legislature's power over education policy-making and appropriations. Plaintiffs ask the Court to declare the system of public school finance unconstitutional. "A declaratory judgment is a court's declaration of legal rights based on questions of law presented to the court". *Common Cause*, 810 P.2d at 211. Judicial power includes "measuring legislative enactments against the standard of the constitution, and declaring them null and void if they are violative of the constitution." *Id.*, 810 P.2d at 210. If the Court rules that the public school finance system is unconstitutionally irrational and underfunded, it falls upon the State to determine how to bring the system into constitutional compliance.

The Court may rule on the constitutionality of a statute even if the result implicates the appropriation of state funds. "[A] court has the power to enter a judgment that in order to be fully implemented might require an additional appropriation by the General Assembly." *State for Use of Dep't of Corrections v. Pena*, 855 P.2d 805, 809 (Colo. 1993); *accord Goebel v. Colorado Dep't of*

Institutions, 764 P.2d 785, 800-801 (Colo. 1988) (*Goebel*); *Barber v. Ritter*, 2007 WL 851764, *16 (Colo. App. 2007).

Almost every state that has found its school funding system unconstitutional has initially left the development of the remedy to the legislature. The courts have typically delayed issuing an order to allow the legislature reasonable time to correct the constitutional deficiencies. *Accord, In re Legislative Reapportionment,* 150 Colo. at 391-92, 374 P.2d at 72. Sensitive to separation of powers issues, the courts have consciously avoided dictating how the legislature should amend the financing formula to bring it into constitutional compliance.

However, if the legislature fails to act to remedy the constitutional violations in a reasonable amount of time, courts must take direct action to implement their orders. *In re Legislative Reapportionment,* 150 Colo. at 390-91, 374 P.2d at 71-72. If a court must order the legislature to appropriate funds, it will not decree how the funds should be raised. Finally, even if the Court ultimately finds it needs to issue some specific directives to the legislature, it will not be required to examine *all* future education policy and appropriation decisions.

ARGUMENT

I. THE SCHOOL DISTRICT PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

A. The *Wimberly* Two-Prong Test and the Subdivision Standing Rule

The Court of Appeals, applying the "political subdivision rule," held that the School District Plaintiffs do not have standing under the Local Control Clause or the Education Clause to challenge the constitutionality of the school finance statutes. *Lobato,* at *4; *citing Denver Ass'n for Retarded Children, Inc., v. School Dist. No. 1,* 188 Colo. 310, 316, 535 P.2d 200, 204 (1975) (*DARC)* It is not disputed that the Individual Plaintiffs have standing.

"Standing is a threshold issue that must be satisfied in order to decide a case on the merits." *Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2004) (*Ainscough).* As question of law, it is reviewed *de novo*. *Id.* at 856. This Court has adopted a two-prong test of general application for determining standing: "whether the plaintiff has suffered *injury in fact* to a *legally protected interest* as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*¸ 194 Colo. 163, 168 570 P.2d 535, 539 (1977) (*Wimberly*) (emphasis added).

The *Wimberly* test embraces both constitutional and prudential concerns. *Id.* at 538-39. The "injury in fact" prong is rooted in the constitutional separation of

powers and Article VI, section 1 of the Colorado Constitution, under which judicial inquiry is limited to the resolution of actual controversies. The prudential prong reflects judicially self-imposed limits on the exercise of jurisdiction. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (*Greenwood Village*).

Specific considerations apply to the standing of political subdivisions. When acting as a subordinate instrument of the state government, political subdivisions "lack standing to challenge the constitutionality of a statute directing their performance." *DARC, supra.* Cases following *DARC* associate this political subdivision rule with the second, prudential prong of *Wimberly*.[23]

The rule serves the public interest in efficiency in the performance of ministerial governmental functions:

> Public policy and public necessity require prompt and efficient action from such officers (county assessors), and . . . they have no right to refuse to perform ministerial duties prescribed by law because of any apprehension on their part that others may be injuriously affected by it, or that the statute prescribing such duties may be unconstitutional.

[23] In *Denver Urban Renewal Authority v. Byrne*, 618 P.2d, 1374, 1379-80 (Colo. 1980) (*DURA*), this Court "special rule" that political subdivisions and their officers "lack standing to assert constitutional challenges to statutes defining their responsibilities" does not conflict with *Wimberly*, but "simply articulates one area in which one class of plaintiffs can claim no legally protected interest." *Mesa Verde Co. v. Montezuma County Board of Equalization*, 831 P.2d 482, 484 (Colo. 1992).

Lamm v. Barber, 192 Colo. 511,519 565 P.2d 538, 544 (Colo. 1977), *quoting Ames v. People*, 26 Colo. 83, 56 P. 656, 658 (1899). Thus, when a political subdivision is acting "in its traditional role as an arm of the state, existing only for the convenient administration of the state government and to carry out the will of the state," to permit it to challenge the acts of the state would serve as "an impediment rather than a convenience." *Board of County Comm'rs of County of Otero v. State Board of Social Services*, 186 Colo. 435, 442, 528 P.2d 244, 247-48 (1974).[24]

The subdivision standing rule is based on the subordinate position of political subdivisions as legislative creations exercising delegated authority for the convenient administration of the state. This leads to the critical exception: political subdivisions may "attack a state statute [where] there has been conferred upon them a *legally protected interest by either statute or constitutional provision.*"

[24] In *Martin v. District Court*, 191 Colo. 107,109, 550 P.2d 864, 866 (1976), the Court stated a closely related rule with respect to disputes between agencies within the executive branch: "In the absence of a statutory right, a subordinate state agency . . . lacks standing or any other legal authority to obtain judicial review of an action of a superior state agency . . . ." The purpose for this rule is to assure that the judiciary does not "unnecessarily intrude into matters which are more properly committed to resolution in another branch of government." *Romer v. Board of County Comm'rs of County of Pueblo,* 956 P.2d 566, 573 (Colo. 1998) (*County of Pueblo)*. *Martin* standing is determined before applying the *Wimberly* analysis. *Maurer v. Young Life,* 779 P.2d 1317, 1323 (Colo. 1989).

Denver Urban Renewal Authority v. Byrne, 618 P.2d 1374, 1380 (Colo. 1980) (*DURA*) (emphasis added; citation omitted).[25]

B. The School Districts Have Alleged Injury in Fact

The Court of Appeals did not address the injury in fact test. We address it here to confirm that if the Appellant School Districts have a sufficient legally protected interest, they have also met this part of the test.

"To determine whether there is an injury-in-fact, we accept as true the allegations set forth in the complaint." *Ainscough*, 90 P.3d at 857. The School Districts allege that the State's failure to provide funding and the ability to obtain funding adequate to fulfill the mandates of the Education Clause, education reform legislation, and the Consolidated State Plan impairs the exercise of their authority to control instruction in their respective schools, in violation of both the Local Control Clause and the Education Clause. R. 47, ¶¶216-17.

Allegations of infringement upon a constitutional or statutory power satisfy the injury in fact requirement. *Colorado General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985) (*Lamm I); Colorado General Assembly v. Lamm*, 704 P.2d

[25] Although they analyze the subordinate state agency rule as an antecedent to the *Wimberly* test, the *Martin* line of cases are consistent in this regard. *See Martin*, 550 P.2d 864, 866 (In the absence of an express statutory right, a subordinate state agency lacks standing or any other legal authority to obtain judicial review of an action of a superior state agency); *County of Pueblo*, 956 P.2d at 573. For practical purposes in this case, the distinction appears to be academic.

1371, 1376-77 (Colo. 1985) (*Lamm II*); *Maurer v. Young Life*, 779 P.2d 1317, 1325 (Colo. 1989) ("allegations of harm to a governmental body's institutional interests through a usurpation of authority by another governmental entity are sufficient to constitute injury in fact . . . ."); *Douglas County Board of County Comm'rs v. Public Utilities Comm'n*, 829 P.2d 1303, 1308-09 (Colo. 1992). If the School Districts have legally protected constitutional interests, it necessarily follows that a finance system that strips away their constitutional authority to control instruction and prevents them from providing mandated services to their residents causes them injury in fact.

C. The School Districts Have Legally Protected Interests within the *Wimberly* Test and the Exception to the Subdivision Standing Rule

The "legally protected interest" prong reflects "judicially self-imposed limits on the exercise of a court's jurisdiction," and recognizes that "parties actually protected by a statute or constitutional provision are generally best situated to vindicate their own rights." *Greenwood Village*, 3 P.3d at 436. "[L]egally protected rights encompass all rights arising from constitutions, statutes, and case law." *Ainscough*, 90 P.3d at 856. A legally protected interest may derive from either an express or an implied grant of authority. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37, 40 (Colo. 1995). The question is "whether the plaintiff has a

claim for relief under the constitution, the common law, a statute, or a rule or regulation." *Ainscough, supra.* Determination of this question is "inextricably tied" to the merits of the claim. *Wimberly,* 194 Colo. at 168, 570 P.2d at 539.

The exception to the subdivision standing rule requires a similar showing that the plaintiff subdivision has an express or implied constitutional or statutory legally protected interest relative to the state or a superior agency with respect to the specific claim at hand. *DURA, supra.* Therefore, we analyze the interests of the School Districts in the contexts of both the *Wimberly* second prong and the subdivision standing rule.

The exception to the subdivision standing rule permits suits by home rule cities based on their right of self-government in local and municipal matters under article XX, section 6 of the Colorado constitution. *Greenwood Village*, 3 P.3d at 438. "[A] home rule city is not inferior to the General Assembly concerning its local and municipal affairs," because "[t]he Colorado Constitution confers upon a home rule city a legally protected interest in its local concerns." *DURA*, 618 P.2d at 1381. Similarly, school districts are not inferior to the State and its agencies in matters affecting the local control of instruction.

School district standing has been recognized in several Colorado appellate cases. The first, *School Dist. No 23 v. School Planning Committee of Weld*

County, 146 Colo. 241, 361 P.2d 360 (1961), antedates *DARC*, *Martin* and their progeny. The school district claimed that the School District Organization Act of 1957 was unconstitutional. This Court held that the school district had standing "to seek a judicial determination as to the legality of legislation under which its existence may be terminated and its property taken" and to determine if acts taken by administrative boards and officials pursuant to that legislation were "lawful or were arbitrary or in excess of their jurisdiction and authority." *Id.*, 361 P.2d at 246.

In *East Grand County Sch. Dist. No. 2 v. Town of Winter Park*, 739 P.2d 862 (Colo. App. 1987), *cert. denied* (1987), the school district and the county sued to enjoin the town from implementing an urban renewal plan using tax increment financing that would impact their property tax revenues. The Court of Appeals held that the school district had a sufficient, implicit legally protected interest to establish standing:

> [The Urban Renewal Law] entitles an affected school district to participate in an advisory capacity with respect to the implementation of tax increment financing in an urban renewal project. Accordingly, we find an implicit indication in the legislative scheme to afford such a district a remedy.

739 P.2d at 865 (citation omitted).[26]

[26] In a similar analysis, this Court found that a county had standing to sue the Denver Water Board based on counties' statutory authority "to provide water services both within and without

In *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), *cert. denied* 526 U.S. 1068 (1999), three school districts brought suit against the State to enjoin implementation of an amendment to the school trust lands article of the Colorado constitution. The Tenth Circuit Court of Appeals upheld the school districts' standing, finding that "even though the districts owe their existence as political subdivisions to the state," under the facts in that case, they are "'substantially independent' from the state of Colorado," and "are 'essentially' the beneficiaries of the federal trust at issue here." 161 F.3d at 628-30.

This Court approved the ruling in *Branson* in *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 892-95 (Colo. 2001). The Court ruled that the school lands trust created by the Colorado Enabling Act and constitution was a federal trust for the "sole and exclusive" benefit of the public school districts. Because the private land-owner plaintiff was "not part of the public school system, nor . . . in any meaningful way connected to the public schools," it did not have standing to sue the state. 31 P.3d at 895. School districts, however, would have standing to sue to protect their interests, as the trust beneficiaries. *Id.*

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their territorial limits" and the general power to "sue and be sued" which evidenced an implicit legislative intent to allow the suit. *Board of County Comm'rs of Arapahoe County v. Denver Board of Water Comm'rs*, 718 P.2d 235, 241-42 (Colo. 1986).

D. School Districts Have Standing to Bring the School Finance Litigation under the Local Control Clause and the Education Clause

Colorado school districts exist and operate within a unique constitutional structure. The Local Control Clause directs the general assembly to "provide for organization of school districts of convenient size" as part of an overall allocation of responsibility for public education between state and local governments that vests "control of instruction" in the local school district directors.[27] Therefore, although the legislature has the power to define and alter the boundaries of school districts, it must create local school districts as part of the structure of public education.

> Our analysis of [the Local Control Clause] reveals that the framers sought to empower the electors in each school district, including the parents of public school students, with control over instruction through the creation of local school boards which would represent the will of their electorate. If the General Assembly wants to change this fundamental structure, it must either seek to amend the constitution or enact legislation that satisfies the mandates of the Colorado Constitution.

Owens v. Colorado Congress of Parents, Teachers and Students, 92 P.3d 933, 943-44 (Colo. 2004) (*Owens*); *see Booth*, 984 P.2d at 645 (Colo. 1999).

[27] Colorado is one of only six states with an express provision for local governance of the public schools. *Board of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 646 and fn. 2 (Colo. 1999).

The genesis of local control is the conflict between the interests of the State and those of the local citizenry acting through their school districts. Local control of instruction is rooted in a "deep distrust of centralized authority" and "ambivalence about legislative power." *Owens*, 92 P.3d at 938, *citing* Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 1 (2002). The Local Control Clause was adopted by the framers in order to "protect citizens from legislative misbehavior" and take away much of the "discretionary authority" of the General Assembly. *Id.* This distrust extended to the State Board of Education, and responsibility for instruction was entrusted to the local school boards out of concern for the risks of state-level corruption and incompetence. *Id.*, 92 P.3d at 948-49.

Consistent with the express delegation of power in the Local Control Clause and the clear historical rationale, this Court's decisions unequivocally confirm that the Local Control Clause grants local school boards "undeniable constitutional authority" that "requires power or authority to guide and manage both the action and practice of instruction as well as the quality and state of instruction." *Booth*, 984 P.2d at 646, 648. Therefore, "legislation must not usurp a local board's decision-making authority." *Id.*, 984 P.2d at 649. The local boards' power to

"control instruction" is coequal with the State Board's "general supervision of the public schools of the state," and:

> [T]he constitution requires balancing the local board's interest in exercising control over instruction with the State Board's interest in asserting its general supervisory authority. It is a balance that first must be struck by the legislature and, if challenged, reviewed by the courts.

Id., 984 P.2d at 646.

Similarly, in *Owens*, this Court affirmed the "constitutional status of the local control requirement" and its function as an expression of the "framers' preference . . . for local over state control of instruction" by the intentional creation of a "constitutional *division of power* between the state and local boards." *Id.*, 92 P.3d at 940, 943-44 (emphasis added).

The connection between the legally protected interest in local control of instruction and exercise of authority in school funding has repeatedly been recognized. In *Lujan*, this Court held that local control was the legitimizing purpose of the school finance system and that "[s]uch control is exercised by influencing the determination of how much money should be raised for the local schools, and how that money should be spent." *Lujan*, 649 P.2d at 1023. In *Owens*, the Court held that local control over instruction is clearly linked to funding, particularly locally raised funds. *Owens*, 92 P.3d at 941-43.

> [T]he local control provision of [article IX,] section 15 protects school districts against legislative efforts to require them to spend locally-raised funds on instruction that the district does not control, and preserves the districts' democratic framework.

Id., 92 P.3d at 940, *citing Lujan*.

In addition to the Local Control Clause, the Education Clause independently creates a legally protected interest sufficient to confer school district standing. In *Board of County Comm'rs of Douglas County v. Bainbridge, Inc.*, 929 P.2d 691 (Colo. 1996) (*Bainbridge*), this Court rejected the argument that the State had preempted the field of school finance by adoption of the PSFA. The Court held that the PSFA serves "to further the General Assembly's constitutional duty to provide a thorough and uniform system of public schools throughout the state." *Id.*, 929 P.2d at 709. The State's interest in education is shared with local governments, including school districts, which "have a clear and direct interest in providing educational opportunity for the residents they serve" and "ensuring that the needs of the student population in their districts are met." *Id.*, 929 P.2d at 711.

These decisions establish that both the Local Control and the Education Clauses provide local boards of education with independent constitutional authority and legally protected interests that directly limit and counter-balance the authority of the State in matters affecting the delivery of public education programs and control of instruction in the schools, including, but not limited to,

school funding. The general assembly and the State Board are prohibited from enacting legislation or regulations that usurp a local board's "decision-making authority or its ability to implement, guide, or manage the educational programs for which it is ultimately responsible." *Booth*, 984 P.2d at 649.

The School District Plaintiffs must have standing to protect and enforce this authority when necessary in the courts. Although subdivision standing was not discussed in the opinion, it is noteworthy that the plaintiffs in *Booth* included the Denver Public Schools and the defendants included the State Board of Education.

The Court of Appeals, however, concluded that local control is linked *exclusively* to the expenditure of locally raised funds and, therefore, the Local Control Clause does not "give [school districts] authority to challenge how the General Assembly appropriates state funds to finance education." *Lobato* at *4. This extraordinarily narrow reading fails both factually and legally.

The School District claims are not simply that the State must appropriate more state money for public education. They claim that the school finance system does not provide funds from any source in a sufficient amount rationally calculated to fulfill the mandate of the Education Clause and the statutes enacted in its name. The school finance statutes regulate *all* school funding, including both local and state sources. The PSFA merges state and local funding within a single system that

dictates the amount of funds that school districts may raise by local property taxation and sets state funding levels for total program revenue in relation to the proceeds from local taxation. The school finance system also mandates the method and limitations on capital expenditures funded through strictly locally funded bonded indebtedness. Therefore, even if the Local Control Clause meant no more than that local school boards have a protected interest in the control of locally raised funds, the school finance system plainly affects that interest, and the School District Plaintiffs have standing.

The Court of Appeals elevates one element of local control – control of local funds – above the far broader principle that it serves. The essence of local control is the responsibility to manage the public schools and the quality and content of instruction. *Owens*, 92 P.3d at 939. "[C]ontrol of instruction requires power or authority to guide and manage both the action and practice of instruction as well as the quality and state of instruction." *Booth*, 984 P.2d at 648. Generally applicable laws offend the Local Control Clause if they usurp the local boards' authority or ability "to implement, guide, or manage the educational programs" committed to their responsibility. *Id.*, 984 P.2d at 649.

Control of locally raised funds is certainly critical to effectuating local instructional control, but it does not define its entire scope. It is merely one

instrument for the accomplishment of local managerial and administrative control by, for example, enabling district residents "to tailor educational policy to meet the needs of individual districts, without state interference." *Owens*, 92 P.3d at 941; *see Lujan*, 649 P.2d at 1022-23.

The finance laws offend both the general principle of local control of instruction and the particular expression of that principle, exclusive control of local funds. The School District Plaintiffs claim that the school finance system prevents them from receiving adequate funding, allocates funding irrationally, and denies them the ability to obtain adequate funding, all of which infringes upon their protected legal interest in exercising the control of instruction necessary to meet the standards of the Education Clause, education reform legislation, and the needs of their communities. This claim is clearly within the local school boards' independent, constitutionally protected interest and satisfies both the *Wimberly* "legally protected right" test and the special rule for political subdivision standing.

II. THE EDUCATION CLAUSE CLAIMS ARE JUSTICIABLE

The Education Clause "explicitly requires the general assembly to establish [and maintain] 'a thorough and uniform system of free public schools throughout the state.'" *Lujan*, 649 P.2d at 1017. With the stated purpose to fulfill this duty, the general assembly has enacted a compendium of statutes including the PSFA,

categorical and other finance programs. Plaintiffs ask the Court to determine whether the school finance laws comport with the constitutional mandate of a "thorough and uniform system of free public schools." In so doing, Plaintiffs invoke the core function of the judiciary "to interpret the constitution and say what the law is." *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1378-79 (Colo. 1985) (*Lamm II*), *quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

Plaintiffs' claims are squarely within the constitutional jurisdiction of the courts. "Pursuant to Colorado Constitution Article VI, section 1, the judicial branch of Colorado government is empowered to construe the constitution's meaning. . . . [T]he judiciary is the final arbiter of what the laws and the constitutions provide." *Board of County Comm'rs v. Vail Associates*, 19 P.3d 1263, 1272 (Colo. 2001) (citations omitted). Indeed, "[o]nly the judicial branch holds the ultimate authority to construe the constitution's meaning." *Washington County Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005).

The Court of Appeals ruled that claims concerning the adequacy of public education funding brought under the Education Clause present nonjusticiable political questions exclusively committed to the discretion of the legislature. *Lobato* at *7-13. The Court of Appeals reached this decision by application of the elements of political question analysis compiled by the United States Supreme

Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962) (*Baker*), and subsequently adopted in Colorado, *see Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 205 (Colo. 1991); *Meyer v. Lamm*, 846 P.2d 862, 872 (Colo. 1993).

The Court of Appeals' decision, especially coming at this preliminary stage of the litigation, is no less than a complete judicial abandonment of the field. The Court of Appeals holds that interpretation of the Education Clause is uniquely and exclusively invested in the general assembly. The necessary corollary is that although the Education Clause expressly creates a constitutional right to a public education, it creates no *judicially enforceable* right. *See Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (*Vieth*). Compliance with the mandate to establish and maintain a through and uniform public education system is then left to the absolute discretion of the legislature: there can be no set of facts whatsoever that would constitute a judicially cognizable constitutional violation. Before reaching such an extraordinary decision, this Court must commit itself to a far more penetrating analysis than that performed by the Court of Appeals.

In general terms, justiciability concerns whether "the duty asserted can be judicially identified and its breach judicially determined, and whether the protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198; *Meyer*, 846 P.2d at 871-72. Justiciability has an "iceberg quality;" concealing

beneath its surface a vast body of complexity of "uncertain meaning and scope" which is "the resultant of many subtle pressures". *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968), *citing Poe v. Ullman*, 367 U.S. 497, 508 (1961).

The Court of Appeals considered these issues in the context of the nonjusticiability of "political questions". *Lobato*, at **7-13. The nonjusticiability of a "political question" is rooted in the separation of powers doctrine. *Common Cause*, 810 P.2d at 205; *Meyer*, 846 P.2d at 871-72; *see Baker*, 369 U.S. at 210-11. In its plainest terms, political question nonjusticiability "recognizes that certain issues are best left for resolution by the other branches of government . . . ." *Common Cause*, *supra.*

We address first the case law recognizing that the Education Clause establishes a constitutional right to a public education in the citizens of Colorado, followed by separation of powers, the *Baker v. Carr* political question issues, and, finally, the question of remedies.

A. The Education Clause Creates a Judicially Enforceable Right to a Public Education

1. The Right to a Public Education Was Recognized in the Early Case Law of the State

In 1927, this Court considered a parent's claim that a school district's rule requiring children to participate in daily Bible reading as a condition of attending

public school violated the law. *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927), *overruled on other grounds, Conrad v. City and County of Denver*, 656 P.2d 662, 670 fn. 6 (Colo. 1982). The Court stated unequivocally that under the Education Clause "the parent has a constitutional right to have his children educated in the public schools of the state." *Id.*, 81 Colo. at 282, 255 P. at 614. Further, the Court identified that a public education must include "certain studies plainly essential to good citizenship" and not those that are "immoral or inimical to the public welfare." *Id.*, 81 Colo. at 280-81, 255 P. at 613.

In *Fangman v. Moyers*, 90 Colo. 308, 8 P.2d 762 (1932), the Court held that the Education Clause assured the right of a child of a broken family to attend school in the district in which he resided with an informal foster family. The Court stated that, in light of the Education Clause, statutes governing education should not be "narrowly and technically construed" to turn children away from the school house "to grow up in idleness and ignorance," but should be "liberally and broadly interpreted" to further the purposes of educating children "to that degree that they can care for themselves and act the part of intelligent citizens." 90 Colo. at 311-312, 8 P.2d at 764.

Not only do these cases affirm the constitutional right to a public education, they identify its basic principles: the acquisition of knowledge and development of

skills necessary to good citizenship and personal welfare. These principles have never changed and provide the fundamental constitutional criteria against which all governmental action affecting the right to a public education is to be measured.

2. *Lujan* Recognized the Right to a Public Education

In *Lujan*, the Court interpreted the Education Clause and applied its interpretation to the public school finance system to the full extent necessary to resolve the claims before it. By reaching a decision on the merits upholding the school finance system, the Court exercised judicial authority, rather than abstaining from judicial review, as would have been necessary if the case presented a nonjusticiable political question. *See United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992).

The Court affirmed that the terms "thorough and uniform" as applied to a system of public education create standards against which the judiciary must measure the constitutionality of the acts of the general assembly, and specifically the school finance laws. Due to the nature of the claims presented, the opinion emphasized what the Education Clause does *not* mean; *i.e.*, that it "does not require that the General Assembly establish a central public school finance system restricting each school district to equal expenditures per student." *Lujan*, 649 P.2d at 1017. But the Court clearly held that although strictly *equal* educational

opportunities may not be necessary, *thorough and uniform* educational opportunities certainly are: "We find that [the Education Clause] is satisfied if *thorough and uniform educational opportunities* are available through state action in each school district." *Lujan*, 649 P.2d at 1025.[28]

Lujan was preeminently an equal protection suit keyed to the contention that education is a "fundamental right" for purposes of equal protection analysis and that, therefore, any financial inequalities within the system were subject to "strict scrutiny" review.[29] *Lujan*, 649 P.2d at 1013-14. The Court declined to embed into the constitution, by way of the equal protection guarantee, the theory that "a lack of complete uniformity in school funding between all of the school districts of Colorado necessarily leads to a violation of the equal protection laws in this state." *Lujan*, 649 P.2d at 1018.

The Court also declined to interpret the Education Clause to establish dollars as the definitive measure of educational quality: "The constitutional mandate which requires the General Assembly to establish a 'thorough and uniform system of free public schools,' is not a mandate for absolute equality in educational services or expenditures." *Id.* In his concurring opinion, Justice Erickson made

[28] Justice Lohr, dissenting, noted that: "the majority appears to hold that the constitutional standard is satisfied if the state insures that some unspecified minimum of educational opportunities is available in each school district." *Lujan*, 649 P.2d at 1041.

[29] The plaintiffs also argued unsuccessfully that "wealth" was a suspect classification for equal protection analysis. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1019-22. (Colo. 1982).

clear that neither the equal protection clause nor the Education Clause mandated identical expenditures, services, and facilities pursuant to a centralized statewide education system. *Lujan*, 649 P.2d at 1027. For purposes of this appeal, the salient point is that the Court interpreted the Education Clause, affirmed that it created a right, and applied its interpretation to the school finance statutes. That the interpretation turns on what the Education Clause does *not* mean in no way diminishes the fact that the Court exercised its judicial function of constitutional review.

In 2002, the Court confirmed this analysis:

> Our decision today does not conflict with *Lujan*, which concluded, for purposes of equal protection analysis, that education was not a fundamental constitutional right triggering strict scrutiny. *Lujan* did not hold that Colo. Const. art. IX, § 2 created no constitutional right to an education; in fact, the case stated that article IX, § 2 "mandates the General Assembly to provide to each school age child the opportunity to receive a free education, and to establish guidelines for a thorough and uniform system of public schools."

In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 No. 21 and No. 22 ("English Language Education"), 44 P.3d 213, 217 (Colo. 2002) (citations omitted).

Two years later, Justice Kourlis wrote that:

> In *Lujan* . . . we recognized that *every eligible student in the state has a right to a free and thorough education*, and that both the state and the local governmental entities have a role in fulfilling that promise. Hence, *the actions of the general assembly must be judged against its charge to provide*

> *a free and uniform system of public schools* within each school district, and against whatever level of control is needed by the local school district to implement the state's mandate.

Owens, 92 P.3d at 947-48, Kourlis, J., dissenting (internal citations omitted; emphasis added).

Plaintiffs here do not argue that the constitution mandates absolute financial or resource equality for all school children and school districts. We do claim that the Education Clause assures all Colorado school children an adequate quality public education, and that to effectuate this guarantee the State must provide the funding needed to pay the costs of the necessary services, resources, and facilities. Plaintiffs do not equate dollars with quality, but join with Justice Erickson in the obvious proposition that without demonstrably sufficient dollars no school district can provide a constitutional public education.

This Court has never varied in construing the Education Clause to create an obligation on state and local government to provide and the correlative right in the citizenry to receive a public education. When faced with legal challenges based on the rights created by the Education Clause, the Court has never abandoned the field as nonjusticiable, but has fulfilled its role as the final arbiter of the constitution.

B. The Separation of Powers Doctrine Does Not Preclude Judicial Review of the Claims

Article III of the Colorado Constitution separates the state government into legislative, executive, and judicial departments, and directs that no department shall exercise powers properly belonging to another. *MacManus v. Love*, 179 Colo. 218, 221, 499 P.2d 609, 610 (1972). Nevertheless, "the boundaries between the three branches of government cannot be precisely defined," but must be delineated on a case-by-case basis. *Colorado General Assembly v. Owens*, 136 P.3d 262, 265 (Colo. 2006) (*Owens*).

Separation of powers considerations arise only when judicial resolution of a controversy requires "policy choices and value determinations that are constitutionally committed for resolution to the legislative or executive branch." *Busse v. City of Golden*, 73 P.3d 660, 664 (Colo. 2003), *citing Baker v. Carr*, 369 U.S. 186, 217 (1962); *Meyer v. Lamm*, 846 P.2d 862, 872 (Colo. 1993). Of course, the mere fact that particular legislation is based on policy considerations (as all legislation obviously is) does not preclude subsequent judicial review for constitutionality. "Our task is not to pass judgment on the wisdom of the General Assembly's policy choices. Rather, it is solely to determine whether those policy choices comport with constitutional requirements." *Owens*, 92 P.3d at 943.

1. Colorado Case Law Upholds Judicial Review of the Claims

This Court has clearly distinguished between the legislative policy-making function and the judicial function to review the constitutionality of statutes enacted pursuant to policy-making:

> The judicial branch of the government has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights granted thereby to the people. In this sphere of activity the courts recognize that they have no power to overturn a law adopted by the Legislature within its constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such case lies with the people. But *when legislative action exceeds the boundaries of the authority delegated by the Constitution, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts.* It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.

In re Legislative Reapportionment, 150 Colo. 380, 384, 374 P.2d 66, 68 (Colo. 1962), *quoting Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 12, 161 A.2d 705, 710 (N.J. 1960) (emphasis added).

The bare fact that the Education Clause affects the realm of public education does not foreclose judicial review. Whenever called upon, this Court has unequivocally assumed the duty and demonstrated the competence to review innovative, policy-based education programs for constitutional compliance. Indeed, the Court has already effectively ruled that school finance claims under the Education Clause are justiciable:

> While it is clearly the province and duty of the judiciary to determine what the law is, the fashioning of a constitutional system for financing elementary and secondary public education in Colorado is not only the proper function of the General Assembly, but this function is expressly mandated by the Colorado Constitution. Colo. Const. Art. IX, Sec. 2. Thus, whether a better financing system could be devised is not material to this decision, as ***our sole function is to rule on the constitutionality of our state's system.*** This decision should not be read to indicate that we find Colorado's school finance system to be without fault or not requiring further legislative improvements. ***Our decision today declares only that it is constitutionally permissible***.

Lujan, 649 P.2d at 1025 (emphasis added).

Lujan is not the only instance where this Court has exercised jurisdiction over constitutional challenges to policy-driven education laws. In *Owens*, the Court found that the "Colorado Opportunity Contract Pilot Program" violated the Local Control Clause. The State argued that the general assembly had determined that the Pilot Program best served the needs of certain children in the exercise of its "plenary authority to guide and implement educational policy." *Owens*, 92 P.3d at 935. The Court replied that its "task is not to pass judgment on the wisdom of the General Assembly's policy choices. Rather, it is solely to ***determine whether those policy choices comport with constitutional requirements***." *Id.*, at 943 (emphasis

added).[30] The Court concluded that the Pilot Program was in clear and irreconcilable conflict with the Local Control Clause and was unconstitutional.

In *Booth*, the Court addressed a potential conflict between the State Board of Education and local school boards concerning the statutory decision-making process in the appeal provisions of the Charter School Act. The Court described the Charter School Act as "novel education reform legislation" enacted in furtherance of the legislature's duties under the Education Clause and as part of its "effort to improve the quality of public education" pursuant to the Education Clause. *Booth*, 984 P.2d at 650-51. Nevertheless, the Court exercised its authority as the final arbiter of constitutionality.

Plaintiffs here seek a declaration of their rights guaranteed under the Education Clause and the Local Control Clause as affected by the system of public school finance and such injunctive relief as may prove necessary to enforce those rights. This is squarely within the function of the judiciary and the decisions of this Court.

[30] Justice Kourlis, dissenting, stated that "Legislatures must be innovative and creative in their policy decisions. Courts, in turn, must evaluate those innovations against the more stable drumbeat of constitutional mandate and precedent." *Owens*, 92 P.3d at 951.

2. Other State Supreme Court Decisions Support Judicial Review

The large majority of decisions by the highest courts in other states have found school finance claims to present justiciable controversies under their state education clauses. An exhaustive survey should not be necessary, but Plaintiffs refer the Court to the recent opinions of the Kansas, Texas, and Nebraska Supreme Courts. *Montoy v. State of Kansas*, 279 Kan. 817, 825-827, 112 P.3d 923, 929-30 (2005) (*Montoy III*); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W. 3d 746, 776-81 (Tex. 2005) (*West Orange-Cove II); Abbott v. Burke*, No. M-969/1372-07 (N.J. Nov. 18, 2008) slip opinion.

In the most recent *Abbott* decision, the New Jersey Supreme Court stated that "[w]e approach the matter before us mindful that all three branches of government have a shared purpose – to achieve for all students compliance with the constitutional command for a thorough and efficient education." *Id.*, slip op. at 27. However, the Court's most significant finding was that the plaintiffs had "worked long and hard to obtain a constitutionally sound, mandated educational program that is supported by a consistent level of State funding. And, *their success has enabled children in Abbott districts to show measurable educational improvement." Id.*, slip op. at 5 (emphasis added).

In language mirroring Colorado precedent, the Kansas Supreme Court stated that:

> [W]e do not quarrel with the legislature's authority. We simply recognize that the final decision as to the constitutionality of legislation rests exclusively with the courts. Although the balance of power may be delicate, ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), it has been settled that the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity. We are not at liberty to abdicate our own constitutional duty.

Montoy III, 279 Kan. at 826, 112 P.3d at 929-30. The Kansas Court quoted the Arkansas and Kentucky Supreme Courts:

> To avoid deciding the case because of "legislative discretion," "legislative function" etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact the Executive) to decide whether its actions are constitutional is literally unthinkable.

Id., 279 Kan., at 827, 112 P.3d at 930 (emphasis removed); *quoting Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 55, 91 S.W.3d 472, 485 (2002), and *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) (*Rose*).

The Texas Supreme Court held that while the legislature has the primary role to decide issues of educational policy, it cannot also be the final arbiter of the constitutionality of those decisions:

> The Constitution commits to the Legislature, the most democratic branch of the government, the authority to determine the broad range of policy issues involved in providing for public education. But the Constitution nowhere suggests that the Legislature is to be the final authority on whether it has discharged its constitutional obligation. *If the framers had intended the*

> *Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable*; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate. The constitutional commitment of public education issues to the Legislature is primary but not absolute.

West Orange Cove II, 176 S.W.3d at 778 (emphasis added).

State supreme courts have also articulated a clear distinction between absolutely equal funding, such as was rejected in *Lujan*, and sufficient funding to provide a sound basic education:

> Although we have concluded that the North Carolina Constitution requires that access to a sound basic education be provided equally in every school district, we are convinced that the equal opportunities clause . . . does not require substantially equal funding or educational advantages in all school districts.

Leandro v. State, 346 N.C. 336, 349, 488 S.E.2d 249, 256 (1997) (*Leandro*). *Accord, Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 909, 801 N.E.2d 326, 333, 769 N.Y.S. 2d 106, 113 (Ct. Apps. 2003); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 241, 877 P.2d 806, 814 (1994) ("[U]nits in 'general and uniform' state systems need not be exactly the same, identical, or equal. Funding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general and uniform requirement."); and *DeRolph v. State*, 78 Ohio St.3d 193, 211, 677 N.E.2d 733, 746 (1997) (*DeRolph I*).

While these opinions are merely advisory, they are well reasoned, consistent with Colorado precedent, and represent the better analysis of this issue.

C. The Education Clause Claims Are Not Nonjusticiable under the Political Question Doctrine

1. *Baker v. Carr* and the Elements of a "Political Question"

In *Baker*, the United States Supreme Court, after a comprehensive review of decisions going back to the early 19th century, summarized the elements that tend to identify a claim as "essentially a function of the separation of powers" and, therefore, within the "political question doctrine" of nonjusticiability:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding with an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 216.

This is not an expansive doctrine, but may be applied only if "one of these formulations is inextricable" from the case. Justice Brennan emphasized the "necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."

Id. Justice Kennedy, concurring in the result but not the reasoning of the plurality in *Vieth, supra*, expressed extreme reluctance to foreclose all possibility of judicial relief through incautious application of the political question doctrine. *Vieth*, 541 U.S. at 306.

An understanding of the cases reviewed in developing the *Baker* formulation is critical in contextualizing the elements listed by the Court. They include a limited and rarified field: foreign relations disputes, such as recognition of a foreign state; dates of duration of hostilities, *e.g.*, deciding when a war has ended; the validity of enactments, such as compliance with internal legislative formalities; and the status and recognition of Indian tribes. The Court also discussed claims under the guaranty of a republican form of government, U.S. Const. art. IV, §4 (the Guaranty Clause). Again, only an exceptional group of Guaranty Clause claims has been found to be nonjusticiable, most of which arose in a far different era in the Nation's history and implicated, for example, the congressional power to recognize which government was established in a state. *Baker*, 369 U.S. at 218-226.

In all those cases, the Court persistently stated that depending on the nature of the specific controversy, the judiciary was not foreclosed from exercising its role as the ultimate interpreter of the constitution and laws. *See, e.g., id.* at 215-16

and 215, fn. 43. Thus, justiciability objections based on lack of manageable criteria fall away when knowable, fundamental principles of a republican form of government are affected. *Id.*, at 222, fn. 48; *see In re Interrogatories Propounded by Senate concerning House Bill 1078*, 189 Colo. 1, 11-12, 536 P.2d 308, 316-17 (1975). Similarly, the courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power," such as arbitrarily calling a body of people an Indian tribe. *Baker*, 369 U.S. at 216. *See also, Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986)(not every controversy that touches upon the area of foreign relations presents a nonjusticiable political question).[31]

With this background, the specific errors in the Court of Appeals' application of the *Baker* elements stand out plainly.

2. The Education Clause Does Not Create an Exclusive, Textually Demonstrable Commitment to the Legislative Branch

The Court of Appeals first held that because the Education Clause directs the "general assembly" to establish and maintain the system of free public education,

[31] This Court, long before *Baker*, recognized that the Governor, as the commander of the military forces of the state under article IV, section 5 of the state constitution, has exclusive and non-reviewable authority to determine when it is necessary to call out the militia and to exercise all necessary powers to effectuate the suppression of an insurrection. *In re Moyer*, 35 Colo. 159, 165-66, 85 P. 190, 192-93 (Colo. 1904). Nevertheless, under different circumstances the exercise of this executive authority is subject to judicial review. *In re Fire & Excise Comm'rs*, 19 Colo. 482, 36 P. 234 (Colo. 1894).

the claims are textually committed to a coordinate political department and, therefore, are nonjusticiable under the first *Baker* element. *Lobato*, at *7. This was the sum of its analysis and presents a perfect example of the "semantic cataloguing" against which Justice Brennan warned. Before reaching such a conclusion, the Court is mandated to interpret the constitution and determine *what power* is conferred upon the general assembly by the specific provision. *Powell v. McCormack*, 395 U.S. 486, 519-21 (1969). This in itself is a "delicate exercise in constitutional interpretation." *Baker*, 369 U.S. at 211.

The fact that the language of the Education Clause imposes the duty upon the "general assembly" is the beginning and not the end of that exercise. Over fifty provisions in the Colorado constitution includes the phrase "the general assembly shall" or "shall not" related to some duty. These provisions are different in meaning and intention. Some provisions appear to be directive or ministerial.[32] Others are more substantive and discretionary, such as those discussed immediately below. The point is that the use of the phrase does not suffice to establish a textual commitment of the subject matter to the exclusive discretion of the general assembly.

[32] *E.g.*, Colo. Const. art. V, §§7, 25a, 27, and 48; art. VIII, §2; art. XI, §§9(4) and 16; and art. X, §§20 and 24.

This Court rejected a reductive interpretation of the phrase "the general assembly shall" in favor of an expansive concept in congressional redistricting controversies under article V, section 44 of the Colorado constitution:

> [T]he term "General Assembly," like the term "legislature" in Article I (of the U.S. Constitution, has been interpreted broadly. The term "General Assembly" encompasses the entire legislative process, as well as voter initiative and redistricting by court order.
>
> The term General Assembly does not simply refer to the lawmakers who must pass a bill. Instead, it is a shorthand method of referring to the entire standard lawmaking procedure set forth in the Colorado Constitution.

People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1236 (Colo. 2003) (*Davidson*)[33] (citations omitted); *see also, Meyer v. Lamm, supra*, 846 P.2d at 869-73 (construing Colo. Const. art. V, §10, "each house to choose its own members") *Littlejohn v. People ex rel. Desch*, 52 Colo. 217, 222, 121 P. 159, 161 (Colo. 1912) ("While the Legislature is expressly commanded by the Constitution to 'pass laws to secure the purity of elections, and guard against abuses of the elective franchise,' (Const. art. 7, § 11), there are, nevertheless, certain limitations beyond which it cannot proceed.'); *Washington County Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146 (Colo. 2005) (*Petron Dev. Co.*) (Colo. Const. art. X, §3(1)(b),

[33] Notably, although the dissenters did not construe the term "general assembly" as broadly as the majority, they affirmed that the Court retained ultimate responsibility to review the legislative redistricting plan for constitutionality. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1246 (Colo. 2003), Justices Kourlis and Coats, dissenting. None of justices believed that the words "the general assembly shall" sufficed to render the entire redistricting process nonjusticiable.

uniform taxation and exemptions); *Milheim v. Moffat Tunnel Improvement Dist.*, 72 Colo. 268, 211 P. 649 (Colo. 1922) (multiple provisions).

The Education Clause must be interpreted in the context of the careful structuring of responsibilities within the entire Education Article. *See Petron Dev. Co.*, *supra*, 109 P.3d at 149 (constitutional taxation and revenue provisions should be read together); *Colorado Common Cause v. Bledsoe*, *supra*, 810 P.2d at 207 (speech and debate clause). This is a radically different provision than the Governor's exclusive constitutional authority over the state militia. *See In re Moyer*, 35 Colo. 159, 85 P. 190 (Colo. 1904). The Founders deliberately divided constitutional responsibility and authority for the provision of public education among the general assembly, the State Board, and the local boards of education, in significant part to limit the exercise of power by a legislature which, at the time, was not considered to be trust-worthy.

This Court has never treated public education and public school finance as exclusively a legislative mandate. *Lujan*, *Owens*, and *Booth* all turned upon the proposition that public education is not the sole prerogative of the legislature. It is, therefore, impossible to conclude that the term "the general assembly shall" commits the field of public education and school finance to the exclusive, unregulated discretion of the legislative branch and beyond the traditional role of

its coequal, the judiciary. It is certainly the general assembly's obligation to act in the first instance to establish guidelines for a thorough and uniform system of public education, but the phrase "the general assembly shall" cannot mean that the judiciary then must abdicate its role of reviewing those acts for compliance with the constitution.

3. Judicially Manageable Standards Exist to Review School Finance Claims under the Education Clause.

The "judicially manageable standards" formulation has itself proven difficult for the courts to manage. In *Vieth*, the United States Supreme Court was unable to produce a majority opinion on whether "fair and effective representation for all citizens" provided a manageable standard in gerrymandering claims. Despite their disagreements in application, the Justices appear to agree that this element reflects concern that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278, Scalia, J. In the absence of "suitable standards" that provide "sure guidance," the results from one "case to the next would likely be disparate and inconsistent." *Id.*, 541 U.S. at 308, Kennedy, J., concurring in the judgment. Put succinctly, the search is for the presence of "workable criteria" for judicial decision-making. *Id.*, 541 U.S. at 343, Souter, J., dissenting.

The Court of Appeals found that the constitutional standards "thorough and uniform" do not provide "any manageable standard for determining the qualitative guarantee asserted by the parents as a method of assessing adequate funding." *Lobato*, at *9. The Court concedes that it is following a minority view among the courts, but one that it found more consistent with its concept of the "principle of judicial restraint." *Id.*, at *7. The Court of Appeals misstated the issue when it described the search as one for workable standards to define an "adequate *quality* public education" against which to measure the "adequacy of funding for education." *Lobato*, at *9 (emphasis by the court) and *8. The issue in this case is the adequacy of school funding, and the search for manageable standards must focus there, not on the more general question of "adequate public education."

Plaintiffs do assert that the Education Clause sets a qualitative minimum standard for a public education that can be typified as at least constitutionally "adequate." But, the Court stumbles over semantics when it states that the Plaintiffs "do not assert that the school finance system fails to provide resources essential to *free basic instruction*" as distinguished from a *constitutionally adequate public education*. *Lobato*, at *9 (emphasis added). R. at 025 ¶ 119; 28 ¶133; 30 ¶140; 32 ¶150; 34 ¶¶156,158; 36 ¶¶166,167, 38 ¶175; R. 44,45,46 ¶¶201, 205-214. The two terms, "free basic instruction" and "constitutionally adequate

public education," both strive to articulate the same concept – the qualitative guarantee of the Education Clause.

As discussed below, the fundamental components of the qualitative guarantee are judicially definable and should be expressed as the minimum standards for the Colorado public education system. Beyond that, the general assembly has enacted substantive education laws that embody its definition of a constitutionally adequate public education system, at least in theory. Plaintiffs do not challenge those policies or the legality of the public education system devised to accomplish them. But the general assembly has failed to provide a finance system that is rationally and intentionally designed to accomplish its system of public education and that does in fact provide sufficient funding. The real question, therefore, is whether there are judicially manageable standards against which to measure the *public school finance system* that must accomplish the public education system.

We begin with the mandate of the Education Clause, which is the establishment and maintenance of a "thorough and uniform system of free public schools." The principal subject matter is a civic public education. The basic purpose of such an education and hence its meaning is universally understood:

> [Public education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation

> of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Education, 347 U.S. 483, 493 (1954). This description is essentially identical to this Court's constructions in *State ex rel Vollmar* and *Fangman v. Moyers*, discussed above.

Public education means education that serves the interests of the state by preparing its children for life within the civic, economic, and cultural world in which they will participate as adults. It is unquestionably the function of the general assembly to decide the policies and enact laws that embody current standards of public education, but the constitution imposes an inflexible minimum against which those laws must be measured. That is the fundamental qualitative standard of the Education Clause which, if not fulfilled by action of the general assembly, results in the denial of the constitutional right. Such a denial could result by failing to devise an adequate education system[34] or, as here, and whether or not the system as devised is adequate, failing to fund it adequately.

[34] The component elements of a public education change with the expectations and demands of society. For example, the Education Clause requires that public schools be open "at least three months in each year", and article IX, section 11, authorizes the general assembly to compel school attendance "for a time equivalent to three years". Today, 130 years later, no one would deny that a system of public education that met nothing more than those standards failed to provide a constitutionally adequate public education.

This inflexible minimum draws meaning from the requirement of a "thorough and uniform system". Whatever dictionary one uses, these words have a common core definition: "thorough" means "complete with regard to every detail; not superficial or partial"; "uniform" means "of a similar character to another or others"; and "system" means "a set of connected things or parts forming a complex whole". CONCISE OXFORD AMERICAN DICTIONARY (Oxford Univ. Press 2006).[35] When applied to the substantive topic of a public education, these terms refine the applicable standard to a further degree of definiteness.

Here again, *Lujan* has already addressed the issue. The Court cited *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979), for a "thorough presentation of the education clauses in other states which are similar or identical to Colorado's 'thorough and uniform' requirement." *Lujan*, 649 P.2d at 1025, fn. 23. The West Virginia Supreme Court defined the constitutional phrase "thorough and efficient" and identified its basic contents:

> We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.
>
> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract,

[35] Plaintiffs acknowledge and appreciate the analysis of nineteenth century definitions presented in the brief of the *amicus* Colorado League of Charter Schools.

> multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work -- to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.
>
> Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.

Pauley v. Kelly, 255 S.E.2d at 877.

Justice Erickson in concurrence quoted the Washington Supreme Court's interpretation that a "general and uniform system," is "a system which, within reasonable constitutional limits of equality, makes ample provision for the education of all children" and is:

> administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.

Lujan, 649 P.2d at 1028, *quoting Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wash.2d 685, 729, 530 P.2d 178, 202 (1974).

Many other state supreme courts have enunciated the principles embedded in their state's education clauses and identified the necessary, basic elements of the

education that must be provided to meet those principles. Perhaps the most frequently cited formulation comes from the Kentucky Supreme Court:

> [A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Rose, 790 S.W.2d at 212.

These substantive standards compel practical necessities that require proper funding:

> The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 316, 655 N.E.2d 661, 666, 631 N.Y.S.2d 565, 570 (Ct. Apps. 1995); *see also DeRolph I,* 78 Ohio St. 3d at 208, 677 N.E.2d at 744 ("Obviously, state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide students a safe and healthy learning environment.").

There is no controversy over the relation between school funding and the quality of public education. "The system of common schools must be adequately funded to achieve its goals." *Rose,* 790 S.W.2d at 211. In Colorado, control over the raising and use of funds is "inextricably linked" to control of instruction and educational policy. *Owens*, 92 P.3d at 941. Without adequate funding, the State and the school districts cannot meet the educational rights guaranteed by the Education Clause. Therefore, sufficient funding must be a characteristic of a thorough and uniform system:

> A thorough system means that each and every school district has enough funds to operate. An efficient system means one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state building and fire codes, and equipment sufficient for all students to be afforded an educational opportunity.

DeRolph v. State¸ 93 Ohio St.3d 309, 312, 2001 Ohio 1343, 754 N.E.2d 1184, 1190-91 (2001) (DeRolph III).

This final point is critical in the case at bar. The Plaintiffs do not challenge the State's exercise in educational policy-making as embodied in educational reform legislation and the State Consolidated Plan. We challenge the school finance system that provides education funding on a formula that bears no rational or intentional relationship to the accomplishment of those policies. Taking the allegations of the Complaint as true, the Colorado school finance system fails to provide sufficient funding to meet the constitutional mandate and the statutes enacted to fulfill that mandate. This is a judicially manageable standard that can be measured, proved, and adjudicated. *See Montoy II*, 278 Kan. 769, 120 P.3d at 309-10.

4. Education Reform Legislation Provides Judicially Manageable Standards

Education reform legislation stems from the affirmation that the Education Clause has qualitative content:

> Every resident of the state six years of age or older but under twenty-two years of age has a ***fundamental right to a free public education*** that assures that such resident shall have the opportunity to achieve the content standards adopted pursuant to this part 4 at a performance level which is sufficient to allow such resident to become ***an effective citizen of Colorado and the United States, a productive member of the labor force, and a successful lifelong learner***.

§22-7-403(2) (emphasis added). Not surprisingly, this definition is virtually identical to the judicial constructions described above.

In the 2008 Preschool to Postsecondary Education Alignment Act, the general assembly found that:

> From the inception of the nation, *public education was intended both to prepare students for the workforce and to prepare them to take their place in society as informed, active citizens who are ready to both participate and lead in citizenship.* In recent years, the emphasis in public education has been squarely placed on areas of reading, writing, mathematics, and science, but it is important that education reform also emphasize the public education system's historic mission of education for active participation in democracy.

§22-7-1002(1)(c) (emphasis added).

> Public education must encourage and accommodate students' exposure to and involvement in postsecondary planning and in activities that develop creativity and innovation skills; critical-thinking and problem-solving skills; communication and collaboration skills social and cultural awareness; civic engagement; initiative and self-direction; flexibility; productivity and accountability; character and leadership; information technology application skills; and other skills critical to preparing students for the twenty-first-century workforce and for active citizenship;

§22-7-1002(3)(e).

The general assembly has defined the "acceptable [student] performance level" necessary to meet the constitutional right:

> The acceptable performance level . . . shall mean the student has the subject matter knowledge and analytical skills necessary to succeed at subsequent grade levels. For graduating students, such acceptable performance level shall mean the student has the *subject matter knowledge and analytical skills that all high school graduates should have for democratic citizenship, responsible adulthood, postsecondary education, and productive careers*.

§22-7-402(9) (emphasis added).

In order to accomplish this standard of achievement, the general assembly has established a comprehensive educational accountability program "to define and measure academic and safety quality in education and thus to help the public schools of Colorado to achieve such quality and to expand the life opportunities and options of the students of this state," which program is "designed to measure objectively the quality and efficiency of the educational programs offered by the public schools." §22-7-102(1) and (2).[36]

The 2008 Preschool to Postsecondary Education Alignment Act affirms that reliable measures of student achievement and other standards exist:

> Since 1993, implementation of standards-based education has resulted in *significant increases in the ability of school districts and the state to measure what each student knows and is able to demonstrate at various levels in the student's academic career* and in significant increases in learning and academic achievement among some students enrolled in the public schools of the state . . . .

§22-1-1002(1)(a). The legislative findings continue to admit that by several specific measures the public education system has failed and is failing to fulfill its purposes:

> Colorado continues to see a widening of the achievement gap, unacceptably high dropout rates throughout the state, unacceptably low numbers of high school graduates who continue into and successfully complete higher

[36] The workings of the education reform legislation are described in more detail in R. 16-20 ¶¶ 84-103.

> education, and an unacceptably high need for remediation among those students who do continue into higher education . . . .

§22-1-1002(1)(b.

Education reform legislation provides a manageable basis for judicial review of the adequacy of school funding. In Kansas, where the state legislature adopted a similar system based on student achievement and school accreditation but failed to fund it adequately or rationally, the Supreme Court held:

> Although . . . accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula.

Montoy II, 278 Kan. at 774, 102 P.3d at 1164.

The State has repeatedly affirmed the critical social value of public education. Invoking its constitutional duties, the general assembly has enacted a pervasive, standards-based system for monitoring student achievement individually, by cohort, by school, and by school district; comparing and ranking the results and progress toward complete proficiency; and applying increasing levels of review and sanction upon schools that fail to meet student achievement markers. Nevertheless, the State has neglected to study, design, enact, implement, or fund a finance system that is intentionally structured to provide the financial resources necessary to attain its stated goals.

This in itself violates the Education Clause: "[A] determination of the reasonable and actual costs of providing a constitutionally adequate education is critical." *Montoy III*, 112 P.3d 923, 937. The State cannot intentionally fail to direct sufficient funding to the accomplishment of a constitutional mandate:

> [A] funding system that distributed state funds to the districts in an arbitrary and capricious manner unrelated to such educational objectives simply would not be a valid exercise of that constitutional authority and could result in a denial of equal protection or due process.

Leandro, 488 S.E.2d at 258.

Contrary to many other states, Colorado has never undertaken a study to determine the overall costs necessary to establish and maintain a system of thorough and uniform schools. The Colorado School Finance Project (CSFP) adequacy study, funded by the public school districts and performed by the same nationally recognized firm whose study was relied upon in *Montoy III*, is the only cost analysis ever undertaken in Colorado. The CSFP study concluded that measured by the standards set in education reform legislation, the PSFA failed to provide adequate funding for not just a few but every school district in the State in an amount exceeding $500 million in 2001 alone.

The Court of Appeals' conclusion that there are no workable standards by which the judiciary can define the right involved, identify its breach, and remedy the violation is erroneous.

D. The Relief Plaintiffs Seek Will Not Usurp the Legislature's Power to Make Education Policy and Appropriations

The two basic justiciability issues are "whether the claim presented and the relief sought are of the type which admit of judicial resolution." *Meyer v. Lamm*, 846 P.2d at 872, *quoting Powell v. McCormack*, 395 U.S. at 516-17. The preceding arguments addressed the nature of the claims presented. Plaintiffs address here the Court of Appeals' apparent concerns that the relief sought would "require th[e] court to invade the Legislature's power to determine policy" and "embroil the courts in the appropriation and budgeting process," presumably in violation of the separation of powers doctrine. *Lobato*, at **10-13. These concerns appear partially in the discussion of the third and fourth *Baker* elements and in the discussion titled "impossibility of immediate resolution. *Id.*, at **10-11.

Plaintiffs seek in the first instance declaratory relief: that the Court declare the system of public school finance unconstitutional. "A declaratory judgment is a court's declaration of legal rights based on questions of law presented to the court". *Common Cause*, 810 P.2d at 211. Judicial power includes "measuring legislative enactments against the standard of the constitution, and declaring them null and void if they are violative of the constitution." *Id.*, 810 P.2d at 210. If the Court rules that the public school finance system is unconstitutionally irrational

and underfunded, it falls upon the State to determine how to bring the system into constitutional compliance.

The Court may rule on the constitutionality of a statute even if the result implicates the appropriation of state funds. "[A] court has the power to enter a judgment that in order to be fully implemented might require an additional appropriation by the General Assembly." *State for Use of Dep't of Corrections v. Pena*, 855 P.2d 805, 809 (Colo. 1993); *accord Goebel v. Colorado Dep't of Institutions*, 764 P.2d 785, 800-801 (Colo. 1988) (*Goebel*); *Barber v. Ritter*, 170 P.3d 763, 778-779 (Colo. App. 2007).

In *Goebel*, an action challenging the adequacy of the mental health care agencies of the State and the City and County of Denver, this Court rejected the argument that it lacked jurisdiction to enjoin the State to implement a remedial plan that might require additional appropriations. The State contended that judicial intervention in resource allocation decisions would violate the separation of powers doctrine. *Goebel*, 764 P.2d at 799. The Court found instead that implementation of a remedial plan "would not violate the constitutional mandate of separation of powers, since the court would simply be interpreting [a state statute], determining the requirements of that act, and directing the defendants to spend . . . funds . . . in accordance with those requirements." *Id.*, 764 P.2d at 800.

This is as far as the Court needs to go at this very preliminary stage of the litigation. The Court has the power to review the Plaintiffs' claims and enter declaratory relief. That eliminates the question of justiciability. Plaintiffs also request injunctive relief to effectuate a declaratory judgment *if, as, and when necessary*. Given the preliminary stage of this litigation, the question of what injunctive or other relief *might* become necessary is hypothetical and premature. If the Court declares the current level of funding for public education unconstitutional, it may be presumed that State Defendants will honor their constitutional obligations to increase appropriations and/or otherwise provide for education without the need of further judicial intervention.

> "A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government not be just as respectful and regardful of the obligations imposed by their similar oath."

In re Legislative Reapportionment, 150 Colo. 380, 386, 374 P.2d 66, 69 (1962), *quoting Asbury Park Press, Inc. v. Woolley,* 33 N.J. 1, 15, 161 A. 2d 705, 712 (1960).

However, both the Court of Appeals and the State have raised the issue, and some analysis of the availability of injunctive relief becomes necessary.

In the ordinary course of governmental operations, the process of funding and appropriation is strictly vested in the legislature. *See* Colo. Const. art. 5, § 32; *Owens*, 136 P.3d at 266 (the General Assembly has plenary power to enact legislation, including appropriations). However, these standard procedures give way once it has been determined that constitutional rights are being violated if the coordinate branches of government are unwilling or unable to remedy the violation in the absence of specific court directives. *In re Interrogatories Submitted by Gen. Assembly on House Bill 04-1098*, 88 P.3d 1196, 1199-1200 (Colo. 2004) (General Assembly's plenary power to appropriate state funds is subject to constitutional limitations).

The fact that a court's ruling may necessitate a legislative body to appropriate funds has never, standing alone, prevented the judiciary from prohibiting the violation of constitutional rights and preventing continuation of such a violation. For example, the courts' vindication of the right to counsel, the right to adequate medical care and living conditions for prisoners, and the right to integrated schools has involved the expenditure of substantial sums of money and is unquestionably within the power of the judiciary. *See, e.g., Ramos v. Lamm*, 520 F. Supp. 1059, 1066 (D. Colo. 1981) (ordering state defendants to present a detailed plan and timetable which sets forth the means by which prison conditions

will be changed so that inmates will be forever protected from further violations of their Eighth and Fourteenth Amendment rights); *Keyes v. Sch. Dist. No. One, Denver, Colo.*, 313 F. Supp. 90, 97-99 (D.C. Colo. 1970) (recognizing that "when a court finds that such inequality of treatment exists, it is constitutionally bound to provide a remedy which will wipe out the inequality 'root and branch'" and ordering that schools be integrated within two-year period and students be provided with compensatory education programs and free transfer during interim period). *See also Goebel, supra*, and *State Department of Corrections v. Pena, supra*.

The remedies requested by Plaintiffs are consistent with the relief granted by many state supreme courts in analogous school funding cases. Almost every state that has found its school funding system unconstitutional has initially left the development of the remedy to the legislature. The courts have typically delayed issuing an order to allow the legislature reasonable time to correct the constitutional deficiencies.[37] *Accord, In re Legislative Reapportionment,* 150

[37] *See, e.g., DeRolph v. State,* 78 Ohio St.3d 193, 213, 677 N.E.2d 733, 747 (1997) ("*DeRolph I")* (staying the effect of its decision for twelve months to give the General Assembly time to enact remedial legislation); *Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee,* 351 Ark. 31, 97, 91 S.W.3d 472, 511 (2002) (staying the effect of its order for two years to enable the General Assembly to enact a constitutional school funding system and the Department of Education time to implement appropriate changes); *Montoy II,* 278 Kan. at 775, 120 P.3d at 310 (staying the issuance of a mandate to allow the legislature an opportunity to address the constitutional infirmity in the school finance formula and setting a deadline for that to be

Colo. at 391-92, 374 P.2d at 72. Sensitive to separation of powers issues, the courts have consciously avoided dictating how the legislature should amend the financing formula to bring it into constitutional compliance.[38]

The courts have made it clear, however, that if the legislature fails to act to remedy the constitutional violations in a reasonable amount of time, they must take direct action to implement their orders.[39] *In re Legislative Reapportionment,* 150

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accomplished); *West Orange-Cove,* 176 S.W.3d at 754 (noting that the district court stayed the effect of its injunction for ten months "to give the Legislature a reasonable opportunity to cure the constitutional deficiencies in the finance system"); *Claremont Sch. Dist. v. Governor,* 142 N.H. 462, 476, 703 A.2d 1353, 1360 (1997) (staying all further proceedings until the end of the upcoming legislative session); *Rose,* 790 S.W.2d at 216 (withholding finality of decision until 90 days after adjournment of General Assembly).

[38] *See, e.g., DeRolph I,* 78 Ohio St. 3d at 213 n.9, 677 N.E.2d at 747 n.9 ("[W]e recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the clearly legislative function of deciding what the new legislation will be."); *Robinson v. Cahill,* 69 N.J. 133, 145, 351 A.2d 713, 719 (1975) ("[T]he selection of the means to be employed belongs to other Branches of government, unimpeachable so long as compatible with the Constitution."); *West Orange Cove,* 176 S.W. 3d at 777 ("[T]he legislature has the sole right to decide *how* to meet the standards set by the people in [the constitution], and the Judiciary has the final authority to determine *whether* they have been met.") (emphasis in original); *Hoke County Bd. of Educ. v. State,* 358 N.C. 605, 638, 599 S.E.2d 365, 390 (2004) (acknowledging that the trial court refused to step in and direct the "nuts and bolts" of the effort to reassess financial allocations and resource provisions for "at risk" children because the state's courts are "ill-equipped" to direct the "mechanics of the public education process"); *Rose,* 790 S.W.2d at 214 (finding "no 'legislating' . . . in the decision of the trial court" because all of the specifics of the legislation were left to the wisdom of the General Assembly); *Campaign for Fiscal Equity, Inc. v. State,* 100 N.Y.2d 893, 925 (2003) (*"CFE III"*) (recognizing that the court must defer to the legislature on matters of policymaking because it has "neither the authority, nor the ability, nor the will, to micromanage education financing"); *Butt v. State of California,* 4 Cal. 4th 668, 694 (1992) (noting that the trial court directed the State, Superintendent of Public Instruction, and the Controller to ensure "by whatever means they deem appropriate" that district students receive their educational rights).

[39] *See, e.g., DeRolph v. State,* 89 Ohio St. 3d 1, 12, 728 N.E.2d 993, 1002-03 (2000) (*"DeRolph II"*) ("[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment

Colo. at 390-91, 374 P.2d at 71-72 (finding judiciary must intervene if the legislature or voters fail to act appropriately to remedy constitutional violations with respect to apportionment within a reasonable time and retaining jurisdiction). Thus, it is only when the legislature has failed to take effective action, that courts have asserted their authority to ensure compliance with the constitution.[40] If a court must order the legislature to appropriate funds, it will not decree how the funds should be raised.[41] Finally, even if the Court ultimately finds it needs to

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unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular Act unconstitutional would be a nullity.") (emphasis in original); *Montoy v. State,* 279 Kan. 817, 828, 112 P.3d 923, 931 (2005) (*"Montoy III"*) (active remediation by judiciary appropriate "[a]s long as such power is exercised only after legislative noncompliance"); *Robinson*, 69 N.J. at 154, 351 A.2d at 724 ("Sometimes, . . . in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government.")

[40] *See, e.g., State v. Campbell County Sch. Dist.*, 32 P.3d 325, 332-33 (Wyo. 2001) ("The legislature's failure to create a timely remedy consistent with constitutional standards justifies the use of provisional remedies or other equitable powers intended to spur action. When insufficient action in the legislative process occurs . . . judicial action is entirely consistent with separation of powers principles and the judicial role."). This is so notwithstanding that compliance might require the legislature to appropriate funds. *See Montoy III,* 279 Kan. at 845, 112 P.3d at 940 (directing the state legislature to implement an increase in annual school funding of $285 million)*; Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 31, 861 N.E.2d 50, 60 (2006) (*"CFE III")* (ordering legislature to spend at least 1.9 billion more per year on the New York City Public Schools after it had failed to meet deadline)

[41] See Jonathan Feldman, Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government, 24 Rutgers L.J. 1057, 1091 (1993). "[I]n the context of school finance, a court could well impose a remedy which required the legislature to increase state funding of education. It would be inappropriate, however, for the court to decree how the funds must be raised (e.g., by ordering the legislature to impose an income tax) . . . The legislative and executive branches are better equipped to address these policy questions."

issue some specific directives to the legislature, it will not be required to examine *all* future education policy and appropriation decisions.

Contrary to the Court of Appeals' suggestion, exercise of jurisdiction will not *necessitate* decades of litigation. *See Lobato,* at *12. The ability to achieve prompt resolution ultimately depends on the good faith response of the State.[42]

Plaintiffs ask that the Court declare the current system of public school finance unconstitutional and defer to the legislature to correct the constitutional violations. Only if the legislature then fails in its duty to remedy the constitutional deficiencies in a timely fashion might the Court need to set some guidelines. That is a question that is not before this Court today. Nevertheless, if called upon, the Court has the power to fashion any necessary equitable remedy without offending the separation of powers doctrine. Courts have always had the power to enforce their orders: "To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper." *Robinson v. Cahill*, 69 N.J. 133, 147, 351 A.2d 713, 720.

[42] *See, e.g., Montoy IV,* 282 Kan. at 12-14, 138 P.3d at 758-59 (noting it was only because the legislature failed to correct the constitutional problems previously identified by the court that the court retained jurisdiction to ensure compliance with its opinions); *West Orange Cove,* at 779 ("[T]he continued litigation over public school finance cannot fairly be blamed on constitutional standards that are not judicially manageable; the principal cause of continued litigation . . . is the difficulty the Legislature has in designing and funding public education in the face of strong and divergent political pressures."); *Campbell,* 32 P.3d at 333 (recognizing that the court's degree of intervention depends upon the facts).

CONCLUSION

For the foregoing reasons, the Plaintiffs request the Court to reverse the decision of the Court of Appeals; affirm that the Plaintiff School Districts have standing to bring claims under the Education Clause and the Local Control Clause; affirm that the Plaintiffs' claims under the Education Clause are justiciable; and remand the case to the district court for trial on the merits.

Dated this 24th day of November, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing **OPENING BRIEF** this 24th day of November, 2008, via email and via U.S. Mail, postage prepaid, upon the following:

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